HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 79 OF 2007.
ALONG WITH
CIVIL APPLICATION (F) NO. 1163 OF 2007.

Bharat Appasaheb patil. ..Appellant.

Versus.

Subhash Anant Patil & two others...Respondents.

Surel S. Shah for the appellant.

H. G. Misar for the respondents.

CORAM: S. B. MHASE &
SMT. NISHITA MHATRE, JJ.

DATE: FEBRUARY 27, 2007.

P.C.

1. This appeal is directed against the judgment and award passed by the Motor Accident Claims Tribunal, Kolhapur in Motor Accident Claim No. 654 of 2000 whereby the claim filed by the appellant was partly allowed with proportionate cost and the respondent nos. 1 to 3 were directed to pay jointly and severally an amount of Rs.4 lacs to the appellant together with interest @ 9% p.a. from the date of the petition till realisation etc., The case of the appellant is that: the appellant was returning from his duty on his motor

cycle bearing No. MH-09 M-9207 from the left side of the road and when he reached near Kondigra Corss on Sangli Kolhapur Road at about 7.30 p..m. at that time truck bearing No. MH-09 Q-5959 came from Kolohapur side in high speed due to which it could not control and at the same time one S.T. Bus bearing No.MH-12 1719 was coming from Jaysingpur side proceeding towards Kolhapur. Further it is the case of the appellant that when the truck was towards the rear side of the petitioner, suddenly the truck driver took his truck towards the extreme left side and in that attempt he dashed against the motor cycle and thereafter also to the S.T.Bus. Due to the impact of dash the appellant sustained serious injuries. Therefore, making allegation that the accident occurred due to the sheer negligence of the truck driver, he filed motor accident claim as stated above claiming an amount of Rs.13,48,000 as compensation as against respondent nos. 1 to 3.

2. Respondent no.1 is the owner of the truck while respondent no.2 is the driver of the truck. The said truck was insured with the respondent no.3. However, after hearing the parties and appreciating their evidence, Motor Accident Claims Tribunal, Kolhapur

has come to the conclusion that the accident in question has taken place as a result of the contributory negligence of the driver of the truck, namely, the respondent no.2 and also the driver of the S.T.Bus. Therefore, the Tribunal concluded that the respondent nos. 1 to 3 are liable to pay only 50% compensation and for remaining 50% amount S.T.Corporation and the driver of the S.T. Corporation is responsible. Therefore, ultimately, while passing the decree the Tribunal has directed the respondent nos. 1 to 3 to make a payment of 50% amount as stated in the award. Therefore, being aggrieved with this award the appellant has approached to this Court.

3. 50% of the amount which was directed by the Tribunal has already been paid by the respondents and appellant has received that amount. Now therefore dispute survives in respect of the remaining 50% amount of compensation. However, the finding has been arrived at that because of the composite negligence, the liability of the respondent nos. 1 to 3 is 50% and remaining 50% liability is of the S.T. driver and S.T.Corporation. Further it is to be noted that the driver of the S.T. and S.T. Corporation were not party

to the Motor Accident Claim. Therefore, finding has been arrived at as against the S.T.Corporation and the driver of the S.T. in their absence which will not be binding as against the S.T. driver and S.T. Corporation unless an appropriate opportunity is offered to them.

. The appellant has now moved a Civil application bearing No. 1163 of 2007 under Order-I Rule-10 of the Code of Civil Procedure for adding the respondent nos. 4 to 6, namely, the S.T.Corporation and the driver of the said S.T. and S.T. Insurance Manager. Thus, the appellant is trying to bring on record the proper parties. In fact, when the trial Court has found that it is a case of composite negligence, and 50% liability is of the S.T.Corporation, the trial Court should have given direction to the appellant to add them as party so as to pass the appropriate award. However, unfortunately the trial Court has failed to give the said directions, and instead the trial Court has passed the award in respect of the 50% of the amount only. Had the S.T. Corporation been joined as a party it would have been equally possible for the S.T.Corporation to demonstrate

that the driver of the S.T. was not responsible for the accident and it is the driver of the truck who is only responsible for the accident.

4. Learned counsel submitted that therefore, in the case of composite negligence the S.T.Corporation and respondent nos.1 to 3 would have made a claim against each other by leading appropriate evidence so that a full fledged decree could have been passed by the Motor Accident Claim Tribunal. In support of the claim of composite negligence he has relied upon a decision of Supreme Court in **Gujarat State Road Transport Corporation v/s. Shardabai and others reported in 1997 ACJ 649**. We have gone through the said judgment. We find that in the said judgment the Court has relied upon the following observations in the earlier decision in 1968 ACJ 1 (MP):

> "Where a person is injured without any negligence on his part but as a combined effect of the negligence of two other persons, it is not a case of contributory negligence but is a case of what is styled as "composite negligence". If due to the negligence of 'A' and 'B', 'Z' has been injured, 'Z' can sue both A and B for the whole damage. There is a clear distinction between contributory negligence and what is termed as 'composite negligence'. The term

> ‘contributory negligence’ applies solely to the conduct of a plaintiff. It means that there has been an act of omission on his part, which has materially contributed to the damage.
>
> It is now well-settled that in case of contributory negligence, courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damages are reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But, in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise.
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> Where a person is injured without any negligence on his part but as a result of the combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is case of what has been styled by Pollock as injury by composite negligence.

. The Court has also relied upon the observations from the Law of Torts 22nd Edition, 1992, by Justice G.P. Singh and approved following observations :

> "In a suit for ‘composite negligence’ the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more

> than his whole damage. He has a right to recover the full amount of damages from any of the defendants.
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> In assessing damages against joint tortfeasors one set of damages will be fixed, and they must be assessed according to the aggregate amount of injury resulting from the common act. The damages cannot be apportioned so as to award one sum against one defendant and another against the other defendant, though they may have been guilty in unequal degree. If two omnibuses are racing and one of them runs over a man who is crossing the road and has no time to get out of the way, the injured person has a remedy against the proprietor of either omnibus.
>
> Those who are sued cannot insist on having the others joined as defendants. The mere omission to sue some of them will not disentitle the plaintiff from claiming full relief against those who are sued."

5. Thus, what we find is that in the case of composite negligence the parties who are responsible for composite negligence should be taken on record, and for that purpose the Trial Court should have issued appropriate directions to the parties before passing the decree. Let the facts as it is, now the appellant has moved a civil application for addition of the parties. Therefore, we in exercise of our jurisdiction under Order-I, Rule-10 allow the said application and allow the petitioner to add respondent nos. 4, 5 & 6 as respondents in the main claim petition. Therefore, civil application is allowed in that terms. The

appellant shall add those parties in his claim petition.

6. We further find that the newly added parties will have to be given appropriate opportunity and therefore we direct the Tribunal to give opportunity to the newly added parties and offer them proper opportunity to examine their witnesses and the newly added respondent will be also entitled for cross examination of the appellant and already examined witnesses of the appellant and respondent nos. 1 to 3. We make it clear that the appellant and respondent nos. 1 to 3 are also entitled to cross examine the witness of S.T. Corporation and also entitled to lead additional evidence.

7. The amendment in the petition shall be carried out within four seeks from today.

8. Tribunal to consider whether for remaining 50% amount of compensation the S.T. Corporation is liable as a composite negligence or not, and pass award accordingly either as against the S.T. Corporation or respondent nos.1 to 3 after hearing the parties on merits. Accordingly this First Appeal is disposed of.

(SMT. NISHITA MHATRE, J.) (S.B.MHASE, J.)